Supreme Court, U.S.
FILED
AUG 9 - 2006
OFFICE OF THE CLERK

(2)

No. 05-1425

In the Supreme Court of the United States

COOPER TIRE & RUBBER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner's campaign literature contained an objectionable threat to withhold an already-accrued annual bonus if the Union won the election, and thus warranted setting aside the election result and directing a second election.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 156 Fed. Appx. 760. The decision and order of the National Labor Relations Board (Pet. App. 25a-33a) is reported at 341 N.L.R.B. No. 64. The decision of the NLRB in the underlying representation proceeding setting aside the first election and directing a second election (Pet. App. 34a-45a), is reported at 340 N.L.R.B. 958.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2005. A petition for rehearing was denied on February 7, 2006 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on May 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a manufacturer of tires and other rubber equipment, operates a warehouse facility in Cedar Rapids, Iowa. Pet. App. 3a. As part of its employee profit-sharing program, petitioner maintains an annual program called the Return on Assets Managed, or "ROAM," bonus. The ROAM bonus is available to employees at several of petitioner's facilities, including those at the Cedar Rapids warehouse. Petitioner treats employees as having earned the bonus as of the last day of the year, but typically disburses the bonus to employees in the middle or end of the following February, when petitioner's board of directors approves the amount of the bonus. For the year ending on December 31, 2002, the board of directors in mid-February approved a ROAM bonus of 6.2% of the employees' base salary; in the five years preceding the 2002 ROAM bonus, the amount of the bonus ranged from 1.38% to 3.65%. *Id.* at 3a-4a.

On December 22, 2002, the International Brotherhood of Electrical Workers Local 1634 filed a petition to represent all full-time regular and part-time warehousemen at the Cedar Rapids facility. Pursuant to a stipulated election agreement, the National Labor Relations Board conducted an election, which was scheduled to take place on January 31, 2003. Pet. App. 4a.

Four days before the election, on January 27, petitioner circulated a memorandum to all voting employees stating its position on the upcoming election. Pet. App. 4a. The memo contained several statements in question-and-answer format, including the following regarding the ROAM bonus:

> Question 22: If the [Union] gets in here, will we still be eligible for the ROAM bonus?
>
> Answer: I don't know. Cooper has some unionized workers at other facilities and none of them participate in the ROAM bonus program. Cooper expects to announce the amount of the ROAM bonus for this year early next month. Early indications show that the ROAM bonus looks very promising this year.

Id. at 5a. At the time petitioner issued that statement, petitioner's board of directors had not yet approved the 2002 ROAM bonus amount, and the voting employees had not yet received their 2002 ROAM bonus. *Id.* at 5a-6a.

The election resulted in a tie vote—six employees voting for the Union and six against, with no challenged ballots—which failed to establish a majority in support of union representation. Pet. App. 6a. The Union filed an objection to the election, arguing that a new election should be held because petitioner's January 27 memorandum threatened employees with the loss of the 2002 ROAM bonus if they selected the Union as their representative. *Ibid.*

2. Following a hearing on the Union's objection, a Board hearing officer issued a report finding merit to the Union's objection. Pet. App. 36a. The hearing officer rejected petitioner's arguments that employees would have reasonably understood the statement in the January 27 memorandum as referring only to *future* bonuses (*i.e.*, those earned in 2003 and thereafter), rather than to *all* ROAM bonuses (including the 2002 bonus the employees had earned but not yet received). *Ibid.*

In exceptions to the hearing officer's report, filed with the Board, petitioner argued only (1) that the statement in the January 27 memorandum could not reasonably be construed in context as a threat that employees might lose the 2002 ROAM bonus, and (2) that petitioner's subsequent statements made clear that the memorandum did not refer to the 2002 ROAM bonus. Pet. App. 37a.

Rejecting petitioner's exceptions, the Board adopted the hearing officer's finding of employer interference and directed a second election. Pet. App. 34a-42a. The Board found that the language of the statement in the January 27 memorandum, when viewed in its entire context, "reasonably suggested to employees that they would be foreclosed from obtaining their 2002 ROAM bonus if the Union represented them," and that receipt of that bonus "was contingent upon the work force remaining non-union." *Id.* at 38a, 39a. In further agreement with the hearing officer, the Board concluded that petitioner did not cure or repudiate any implied threat regarding the employees' receipt of the 2002 ROAM bonus. *Id.* at 39a.[1]

3. The Union prevailed in the second election, conducted on December 3, 2003. Pet. App. 8a. In the absence of objections to that election, the Board's Regional Director certified the Union as the exclusive bargaining representative of petitioner's warehouse employees. *Id.* at 28a.

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[1] Chairman Battista dissented, on the basis that employees understood that they would receive the 2002 ROAM bonus, and that, even assuming that the 2002 bonus was not definite until the board of directors approved it, that bonus could be placed on the bargaining table. Pet. App. 43a-45a.

4. Petitioner refused the Union's request for bargaining, citing its disagreement with the Board's decision to set aside the initial election. Pet. App. 8a. Based on the Union's unfair labor practice charge, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 8a. Finding that all issues relevant to the unfair labor practice complaint were or could have been litigated in the representation proceeding, the Board granted the General Counsel's motion for summary judgment, found that petitioner's refusal to bargain with the Union violated the Act, and ordered petitioner to bargain with the Union. *Ibid.*; *id.* at 29a, 30a.

5. The court of appeals enforced the Board's order. Pet. App. 1a-24a. The court first rejected petitioner's argument based on *Shaw's Supermarkets, Inc.* v. *NLRB*, 884 F.2d 34 (1st Cir. 1989), that the Board had departed from precedent in holding that a single, implied threat to eliminate an existing benefit warranted a new election.[2] Pet. App. 9a-12a. The court then concluded that substantial evidence supported the Board's finding that petitioner engaged in objectionable conduct sufficient to taint the election. *Id.* at 12a-20a. The court upheld the Board's finding that petitioner's January 27 memorandum was coercive, because employees reasonably could have inferred that receipt of the 2002 ROAM bonus, which they had already earned, would be in jeopardy if employees unionized. *Id.* at 20a. Furthermore,

[2] In so doing, the court did not resolve the Board's contention that judicial review of petitioner's departure-from-precedent argument was jurisdictionally barred by Section 10(e) of the Act, 29 U.S.C. 160(e), because petitioner failed to raise that argument before the Board. See pp. 7-8, *infra*.

the court rejected petitioner's arguments that additional facts either detracted from the Board's valid finding of objectionable conduct or otherwise cured the taint of petitioner's conduct. *Id.* at 15a-20a.

Judge Batchelder dissented. Pet. App. 20a-24a. She concluded that the statement in petitioner's January 27 memorandum was a permissible prediction of the results of future collective bargaining, because the "most reasonable interpretation of [the statement] is that it pertains only to *future* ROAM bonuses." *Id.* at 22a (emphasis in original). Judge Batchelder did not address the majority's rejection of petitioner's argument based on the First Circuit's decision in *Shaw's Supermarkets*. *Id.* at 20a-24a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Relying on the First Circuit's decision in *Shaw's Supermarkets, Inc.* v. *NLRB*, *supra*, petitioner predicates its argument for review entirely on the assertion (Pet. 7-17) that the Board has developed two conflicting lines of precedent governing whether an employer's single, implied threat to "bargain from scratch" if the union is elected warrants setting aside an election lost by the union. Petitioner claims (Pet. 9-10, 14) that in *Shaw's Supermarkets*, the First Circuit identified a line of Board cases holding that such a single, implied threat is not objectionable or unlawful, but that the Board's decision here finding petitioner's conduct to be objectionable demonstrates that the Board has developed a conflicting line of precedent "governing materially identical situa-

tions where an employer makes a single implied 'bargaining from scratch' threat." Petitioner's argument should be rejected.

2. Initially, petitioner failed to make that argument to the Board, and therefore this Court cannot consider it. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has enforced that provision strictly, holding that Section 10(e) is jurisdictional, and that the failure to present an issue before the Board precludes subsequent judicial consideration of that issue. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982).

Here, in response to the hearing officer's report finding that petitioner's conduct was objectionable and had tainted the initial election, petitioner failed to assert any departure-from-precedent arguments in its exceptions to the Board. Instead, it made only factual arguments that its statement to employees referred to future ROAM bonuses and that, even if construed to refer to the 2002 benefits, its subsequent comments repudiated that construction.[3] Petitioner's submissions to the

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[3] Petitioner's exceptions to the Board were as follows:

1. The Hearing Officer['s] err[or] in shifting the burden of proof in this case from the Union to Cooper.

2. The Hearing Officer's conclusion that an eligible voter could reasonably interpret Cooper's statement in Q & A #22 of its January 27, 2003 memorandum that it doesn't know if employees will still be eligible for the ROAM bonus program if the union wins the election as threatening the loss of the 2002 ROAM bonus that the employees had already earned.

Board did not cite *Shaw's Supermarkets* or the Board decisions discussed by the First Circuit in *Shaw's Supermarkets*. Accordingly, the Court lacks jurisdiction to address the legal argument petitioner asserts as the sole basis for further review.

3. In any event, petitioner's argument that the Board's decision is part of a line of cases in conflict with *Shaw's Supermarkets* and the Board cases discussed therein is flawed, because the threat at issue here is neither the same as, nor "materially identical" to (Pet. 14), the "bargaining from scratch" statements addressed in *Shaw's Supermarkets*. As the Board found, this case involves a veiled threat by petitioner to withhold a benefit that had vested prior to the election if employees selected union representation, because petitioner's state-

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3. The Hearing Officer's conclusion that Cooper's statement in the January 17, 2003 and January 27, 2003 memoranda would not make clear to a reasonable, eligible voter that Q & A #22 concerned eligibility for future ROAM bonuses rather than threatened the loss of the 2002 ROAM bonus.

4. The Hearing Officer's conclusion that General Manager Todd Lemke's statement at the January 30, 2003 facility-wide meeting that employees could "count on" a 6.2% ROAM bonus for 2002 payable in mid to late February did not make clear to a reasonable, eligible voter that Q & A #22 concerned eligibility for future ROAM bonuses rather than threatened the loss of the 2002 ROAM bonus.

5. The Hearing Officer's refusal to find that General Manager Todd Lemke's statement that employees could "count on" a 6.2% ROAM bonus for 2002 payable in mid to late February constituted a repudiation of any previously implied threat in Q & A #22 that employees could lose the 2002 ROAM bonus that they had already earned.

C.A. App. 0134-0135 (citations omitted); see Pet. App. 37a.

ment conveyed that employees "would be *foreclosed* from obtaining their 2002 ROAM bonus if the Union represented them." Pet. App. 38a (emphasis added). Such a threat to withhold a benefit that had already vested has long been treated as unlawful and/or objectionable pre-election misconduct. See *Pearson Educ., Inc.* v. *NLRB*, 373 F.3d 127, 131-132 (D.C. Cir. 2004) (upholding the Board's conclusion that employer engaged in objectionable conduct by telling employees that announced wage increase in a specified amount would be lost if union won the election), cert. denied, 543 U.S. 1131 (2005); *Georgia-Pacific Corp.*, 325 N.L.R.B. 867, 867-868 (1998) (employer engaged in objectionable pre-election conduct by suggesting that employees would be foreclosed from bonus plan if they were represented by a union); *Bronx Metal Polishing Co., Inc.*, 268 N.L.R.B. 887, 890 (1984) (employer unlawfully coerced employees during unionization campaign by threatening to eliminate accrued vacation time); *Union Camp Corp.*, 202 N.L.R.B. 1023, 1023-1024 (1973) (employer's pre-election statement to employees implying that union's advent would mean deferral of accrued vacation benefits is objectionable).

By contrast, the employer conduct at issue in *Shaw's Supermarkets* and other cases cited by petitioner (Pet. 7-17) involved a materially different kind of alleged threat. Specifically, those cases concerned employer statements to employees that any bargaining following the selection of a union representative will begin from

"scratch,"[4] from "zero,"[5] or the like.[6] Such statements are different because, depending on the particular circumstances, they constitute either (1) permissible statements indicating that mere selection of a union will not automatically secure increased wages and benefits and that all such items are subject to bargaining; or (2) unlawful statements that, in context, convey that the employer will unilaterally discontinue existing benefits prior to negotiations or will adopt a regressive bargaining posture to penalize employees for selecting a union. See *NLRB* v. *General Fabrications Corp.*, 222 F.3d 218, 231 (6th Cir. 2000); *TRW-United Greenfield Div.* v. *NLRB*, 637 F.2d 410, 420-421 (5th Cir. 1981). As the Board recently stated, although employer statements during an organizing campaign that bargaining will start from "zero" or from "scratch"

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[4] *La-Z-Boy*, 281 N.L.R.B. 338, 339 (1986); *Mississippi Chem. Corp.*, 280 N.L.R.B. 413, 417 (1986); *Clark Equip. Co.*, 278 N.L.R.B. 498, 499 (1986); *Plastronics, Inc.*, 233 N.L.R.B. 155, 155 (1977); *Campbell Soup Co.*, 225 N.L.R.B. 222, 225 (1976); *Computer Peripherals, Inc.*, 215 N.L.R.B. 293, 293 (1974); *Wagner Indus. Prods. Co., Inc.*, 170 N.L.R.B. 1413, 1413 (1968).

[5] *Noah's Bay Area Bagels, LLC*, 331 N.L.R.B. 188, 188 (2000); *Histacount Corp.*, 278 N.L.R.B. 681, 686 (1986); *Belcher Towing Co.*, 265 N.L.R.B. 1258, 1260 (1982), enforced in relevant part, 726 F.2d 705 (11th Cir. 1984).

[6] *Exxon Research & Eng'g Co.* v. *NLRB*, 89 F.3d 228, 230 (5th Cir. 1996) (bargaining would begin with "a blank sheet of paper"); *Shaw's Supermarkets*, 884 F.2d at 35 (bargaining would "start with minimum wages and workmen's comp"); *Beverly Enterprises-Indiana, Inc.*, 281 N.L.R.B. 26, 29 (1986) (bargaining "starts out fresh"); *Ludwig Motor Corp.*, 222 N.L.R.B. 635, 635 (1976) ("[N]egotiation is going to start with a blank piece of paper."); *White Stag Mfg. Co.*, 219 N.L.R.B. 1246, 1248 (1975) ("Bargaining starts at what we call the bare table.").

> are not per se unlawful, the Board will examine them, in context, to determine whether they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore, or—conversely—whether they indicate that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining.

Federated Logistics & Operations, 340 N.L.R.B. 255, 255 (2003) (citations and quotation marks omitted), enforced, 400 F.3d 920 (D.C. Cir. 2005). See 1 *The Developing Labor Law* 135, 137-138 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001) (recognizing that the Board has identified "bargaining from scratch" statements as a "recurrent phrase[] used in election campaigns" that can be difficult to assess and depend on context and "totality of the circumstances").

Petitioner's threat clearly was not a "bargaining from scratch" statement. Unlike any of the cases on which petitioner relies, this case involves no statement to the effect that bargaining would begin "from scratch." Indeed, the 2002 ROAM bonus was not a benefit that petitioner could legitimately subject to the "normal give and take of collective bargaining." *Federated Logistics & Operations*, 340 N.L.R.B. at 255. Rather, as the Board explained, "[a]s entitlement to [the 2002 ROAM] bonus had vested *prior* to the election, it was not a benefit that [petitioner] could thereafter threaten to eliminate or condition on the Union being able to bargain it back for the employees." Pet. App. 40a; see *Pearson Educ.*, 373 F.3d at 132 ("A promised [benefit] must be

awarded even if a union wins an election."). In short, petitioner's threat did not implicate the analysis of *Shaw's Supermarkets* and the other cited "bargaining from scratch" cases, and, accordingly, petitioner's claim that the Board has developed conflicting authority is without basis.

4. For the same reason, petitioner's assertion (Pet. 17-22) of a circuit conflict is unfounded. Petitioner claims that the decision of the court of appeals conflicts with the decisions of the First Circuit in *Shaw's Supermarkets* and the Fifth Circuit in *Exxon Research & Engineering Co.* v. *NLRB*, 89 F.3d 228, 230 (5th Cir. 1996), which held that, in a context free of other unfair labor practices, an employer lawfully told employees that bargaining would begin with "a blank sheet of paper." As shown above, this case involves a threat to withhold an earned benefit, not a "bargaining from scratch" statement that, depending on the context, can be lawful. Accordingly, there is no direct conflict between those decisions and the court of appeals' decision in this case.[7]

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[7] Petitioner's claim of a circuit conflict is infirm for the additional reason that, when actually ruling on the legality of employers' "bargain from scratch" statements, Sixth Circuit decisions are consistent with the decisions of the First and Fifth Circuits. For example, in *NLRB* v. *St. Francis Healthcare Centre*, 212 F.3d 945 (6th Cir. 2000), the court concluded that an employer's statement that any negotiations with a union would start "from zero" or "from scratch" was a permissible prediction of hard bargaining, because the statement's timing and the union's ample opportunity to respond tended to negate any implication of coercion. *Id.* at 956-957. In *NLRB* v. *General Fabrications Corp.*, *supra*, the court agreed with the Board that an employer's statement that any bargaining would begin "at zero" was coercive because it was made in the context of other unfair labor practices and an overriding "atmosphere of anti-union animus." 222 F.3d at 230-231.

5. Finally, there is no conflict between the decisions below and any decision of this Court. Contrary to petitioner's claims (Pet. 27-28), the decisions below do not violate this Court's command in *Atchison, Topeka & Santa Fe Railway* v. *Wichita Board of Trade*, 412 U.S. 800 (1973), that an agency decision "clearly set forth" the basis for any departure from prior norms "so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate." *Id.* at 808. As demonstrated above, the *Shaw's Supermarkets* precedent from which petitioner claims the Board departed without explanation, and which petitioner did not even cite to the Board, does not apply to the misconduct at issue in this case.

Equally incorrect are petitioner's claims (Pet. 16, 24-25) that the Board and court of appeals decisions are in conflict with *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359 (1998). Although petitioner accuses the Board of "imped[ing] judicial review * * * by disguising its policymaking as factfinding," *id.* at 376, and of "applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced," *id.* at 374, those claims are based entirely on petitioner's erroneous assertion that the Board's decision here amounts to an unacknowledged development of conflicting lines of authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2006